

HEIRS OF RICHARD SHUBRICK.

MAY 25, 1842.

Submitted to the House by Mr. Barnard, laid upon the table, and ordered to be printed.

Mr. BARNARD, from the Committee on the Judiciary, submitted the following

REPORT:

The Committee on the Judiciary, to whom was referred the bill for the relief of the heirs of Richard Shubrick, with instructions to report whether, in a legal point of view, if there were no statutes of limitation in the way, the widows or orphans of officers of the continental line of the revolutionary army, who were killed or died in the service prior to the 15th of May, 1778, (the day the act granting seven years' half pay to officers who should serve to the end of the war was passed,) are or are not entitled to the seven years' half pay granted by the act of the 24th of August, 1780, to the widows and orphans of all officers who had died or who should die in the service, report:

That the committee have given this subject deliberate and anxious consideration and examination, and now proceed to state to the House the result to which they have come, remarking that they have confined themselves wholly to the consideration of the legal question presented by the instructions of the House; and they express no opinion whatever on the merits of this claim in any other respect, or on any other question or point involved in it.

The claim in this case is for seven years' half pay, as due to the surviving orphan child and heir of Richard Shubrick, who was a military officer, commissioned by Congress, in the service of the United States, in the revolutionary war, and who died in that service on the 8th day of November, 1777; and the claim rests immediately on the following resolution, which was passed by Congress on the 24th day of August, 1780:

"Resolved, That the resolution of the 15th day of May, 1778, granting half pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or shall hereafter die, in the service, to commence from the time of such officer's death, and continue for the term of seven years, or, if there be no widow, or in case of her death or intermarriage, the said half pay be given to the orphan children of the officer dying as aforesaid, if he shall have left any; and that it be recommended to the Legislatures of the respective States, to which such officers belong to make provision for paying the same on account of the United States."

The object of this resolution, as expressed on its face, was to *extend* the provisions of a previous resolution of the same Congress—to extend the

benefits of that previous resolution to the families of those officers, in the event of their death, for whom the resolution of the 15th of May, 1778, provided; but whether it was designed to extend those benefits to the families of another and a distinct class of officers, namely, such as had previously died in the service before the passing of the resolution of the 15th of May—this is the doubt and the question in the case.

The resolution of the 15th of May, 1778, was in these words:

“Resolved, unanimously, That all military officers commissioned by Congress, who now are, or hereafter may be, in the service of the United States, and shall continue therein during the war, and not hold any office of profit under these States, or any of them, shall, after the conclusion of the war, be entitled to receive, annually, for the term of seven years, if they live so long, one-half of the present pay of such officer,” &c.

There is no difficulty in understanding the object and meaning of this resolution. It was not an act granting pensions; it had no reference whatever to past services or sufferings; it looked wholly to the future, and was an offer and a contract, on the part of the Government, to pay, in addition to payments already contracted to be made, a certain sum in future to certain persons, for services to be rendered to the country in a particular way, and for a certain term, from and after the date of this new offer and promise. It was as much a contract, and as simply a contract, as was the engagement to pay the officers and soldiers of the army a certain rate of monthly pay. It was a contract with a part only of those who belonged, or who should belong or be attached, to the armed force of the country; it was confined to military officers, and did not embrace naval officers, or the medical staff of the army. It was confined to officers commissioned by Congress, and of course did not embrace those in the militia of the States, though in the service of the United States. It was a contract to pay after the conclusion of the war, and only to such as should continue in service to the close of the war.

Such was the plain meaning of this resolution; and the object which Congress had in view in offering these terms of contract is equally plain and apparent. It was not, as in retrospective pension laws, to perform an act of generosity, gratitude, and justice, towards individuals, in consideration of past services and sufferings; it was distinctly, definitively, and solely, to fill the ranks of the continental army, and keep them full to the close of war, and to this end to make such an offer of pay and remuneration as might induce competent and proper persons to enter and continue in the service. The history of the period settles this point conclusively. For months the measure had been urged upon Congress, by the commander-in-chief of the army, with unwonted earnestness and pertinacity. In his letters to the President of Congress, he described the army as fast melting away for want of such a provision. “If my opinion is asked,” said he, “with respect to the necessity of making this provision for the officers, I am ready to declare that I do most religiously believe the *salvation of the cause* depends upon it,” &c. “Day after day and hour after hour produce resignations,” &c.* There is no doubt the army would soon have been left without competent officers but for this measure; for it was the best of those in the service that were throwing up their commissions, while none, or few, offered to come in and take their vacant places, but such as must

* Letter of 10th April, and letter of 30th April, 1778—Sparks's Writings of Washington, vol. 5.

have degraded and disgraced the service. It was this state of things, and this alone, that induced Congress to make the tempting offer of this resolution; and Congress was brought to make the offer with great reluctance and difficulty. Nothing but the stern necessities of the case finally prevailed on that body: and when the measure was at last adopted, it was done with as much restriction and limitation as possible. Washington had asked for officers who should serve to the end of the war half pay for life, with some provision for the widows and orphans of those who should be slain in battle. Congress, after the greatest delay, and after long and tedious discussions, offered half pay only for seven years, confining the provision strictly to officers in the line of the army commissioned by itself, and excluding all provision whatever for widows and orphans.

This resolution, then, was an offer and a contract made by Congress, with special care and caution, against extending its terms and provisions further than was deemed absolutely necessary at the time, and designed solely to induce those meritorious officers then in the army to remain, and others to come in, to serve for the period of the war. It was no part of the policy of this act to reward any body for past services, or to discharge any debt of gratitude or justice theretofore contracted. Officers then in the army, and who had served thus far in the war, were placed, so far as this measure was to go, on the same footing with those who should come in after the new act was passed, down even to those who should come in in the last year or the last month of the war. And so far was it from the intention of Congress at that time to discharge any duty it owed to the surviving families of those who had been slain, or who had died in the military service of the country, that it refused even to make, prospectively, any provision for the families of those officers who might thereafter die in the service, though this had been urged on Congress, and though, in so doing, it would have offered another and a very strong inducement towards preserving and filling the commissions of the army, and a powerful means of building up and maintaining its efficiency.

Upon this resolution of the 15th of May, 1778, Congress rested for a considerable period, though it is certain that the army was still restless and dissatisfied. Congress still refused, by any act of its own, to make any provision for the families of officers who should die in the service, though it did recommend, by resolution of the 17th of August, 1779, to the several States, that they should make such provision as they should see fit for the widows and children of officers and soldiers of the army, belonging to such States, respectively, who should die in the service. At length, however, on the 24th of August, 1780, Congress felt itself forced to take another step for the satisfaction of the army, and passed the resolution of that day, which has been before recited. By that resolution, Congress declared and contracted, that the half pay granted by the resolution of the 15th of May, 1778, to certain officers of the army, should be extended to the widows or orphan children of those officers who had died or should die in the service.

The phraseology of this resolution is not as precise as it might have been, but, when critically examined, cannot, it is believed, admit of more than one interpretation. It reads, "that the *resolution*, &c., be extended," &c.; but it is the "*resolution*, &c., *granting half pay*" that is to be extended, and the expression is precisely equivalent to this: "that the *half pay* granted heretofore to *certain* officers be now extended, in case of their death in service, to their widows or orphan children." It was the promise of half

pay, and nothing else, that was proposed to be extended, and it was that same *identical* half pay which had been promised and contracted for by the former resolution; it was that same half pay that had been promised, on the 15th of May, 1778, to those military officers, commissioned by Congress, who *then were* or should afterwards be in service, and who should continue in service during the war, which was now proposed, and promised to be extended to the widows and orphan children of those officers dying in the service. The subject upon which this resolution operated was the half pay granted by the former resolution. By the former resolution this half pay was, on a condition, to become the right and property of the persons therein described; that condition was their continuing in service to the end of the war, and no provision was made for the contingency of their death in the mean time. On this event, the right and property would become lapsed and lost; and it was to meet and provide for this contingency and event that the resolution of the 24th of August, 1780, was passed. It was a declaration on the part of Congress that a failure on the part of the officers to perform the condition on which their half pay was made to depend, by the event of death, should not operate to defeat the promise and benefit which had been made and proposed to them: the half pay should descend to their widows or orphan children. The half pay granted to *certain* officers shall be extended, said Congress, "to the widows of *those* officers who have died, or shall hereafter die, in the service;" not to the widows of *all* officers who had died or who should die in the service, but to the widows of such of those officers, to whom the half pay had been promised, as had died or should die in the service; "or," said the resolution, "if there be no widow, &c., the *said half pay* be given to the orphan children of the officer dying as aforesaid." It was, in effect, like a codicil to a testament, disposing of a *particular gift*, or appointing the manner in which that particular gift should descend or be disposed of, in case it failed, by the intermediate event of death, to vest absolutely, according to the disposition and direction of the original instrument.

It is believed that this is the true construction and meaning of the resolution of the 24th of August, 1780, interpreted by its language only, in connexion with the resolution of the 15th of May, 1778, and that it cannot justly bear the construction which has sometimes been given to it, by which it has been made to relate back so as to include and confer the benefit of half pay on the widows or orphan children of officers who were not themselves within the purview of the original act of Congress, and to which, as we think, this resolution was merely supplemental, touching no subject except the identical half pay already promised and given by that original act.

And this view of the matter must be strengthened and confirmed, if we recur again to the consideration of the policy and design of Congress in this measure, to which we have before adverted. Congress, from the beginning of the war to the close, avoided, as far as possible, establishing, by its own authority, any system whatever, or any provision, for the voluntary discharge of the nation's debt of gratitude to the army of the United States, or to those who were dependent on the officers and soldiers of that army. Whatever it did was done in the way of inducement, in the way of encouragement, and in the way of contract, and had reference almost solely to the maintaining of the numbers and efficiency of the army. Whatever was

necessary to be done with this view, and could not be omitted, Congress did; and it did little or nothing more.

In September, 1776, Congress provided for raising eighty-eight battalions, to serve for the war. As an inducement held out to officers and men to engage "for the war," Congress offered a money bounty of twenty dollars, which was just double what had been paid before, to each non-commissioned officer and private soldier, and proposed and agreed, moreover, to make a grant of lands to officers and men who should engage and continue to serve to the close of the war, in specified quantities, according to grade and rank, and to the representatives of such as should be slain by the enemy. Neither the money bounty nor the land bounty here promised related back so as to embrace the case of any officer or soldier, or the widow or children of any officer or soldier, who had served or suffered in the service previous to the date of the resolution; the resolution did not touch the case of those who fought or those who fell at Lexington or Bunker Hill. It offered no bounty of land to any officer above the rank of colonel; and it was not till August, 1780, that this bounty was extended to general officers. It did not embrace the medical department of the army, which stood excluded till September, 1780. And, finally, in promising a grant of land to the representatives of such officers and soldiers, embraced within the resolution, as should be "slain by the enemy," it excluded the representatives of all such as should die in the service in any other manner.

The provision made in this resolution for bounties in land extended, as has been seen, to the representatives of such officers and soldiers as *should* be slain by the enemy. It could have, therefore, no retrospective operation. We believe that the resolution of the 15th May, 1778, with the supplementary resolution of the 24th of August, 1780, had the same general object in view, namely, to offer the requisite inducements for filling up and maintaining the commissions and ranks of the army for the period of the war; and we cannot entertain a doubt, if Congress had seen fit, in the first of these resolutions, (that of the 15th May,) to extend the promise of half pay to the widows or children of those on whom the resolution was intended to operate, the language would have been no more equivocal than that employed in the resolution of September, 1776. When it came to supply this omission by a subsequent resolution, language was necessarily employed to give the resolution a retrospective effect, because it was intended to extend the promise of half pay to the widows and orphan children of all those officers to whom the half pay was originally promised, as well those who had died in the service since the original resolution was passed as those who should die thereafter. Beyond this, however, we think it clear the resolution was not intended to act retrospectively.

It may be well enough remarked, in passing, that the representatives of Richard Shubrick, in this case, could not lay claim to bounty lands under the resolution of September, 1776, though he might personally have been embraced in its terms, because he was not "slain by the enemy;" and we think they are not entitled, under the resolutions of May, 1778, and August, 1780, because, dying in the service previous to the time of these resolutions, neither he nor they were embraced in their provisions. It was not the policy or design of Congress at the time to provide for his or their case, and simply or mainly because it was not necessary to do so in furtherance of the principal object then in view, which was to supply necessary in-

duancements to preserving, filling up, and maintaining the commissions and ranks of the army for the period of the war.

It may be stated, in aid of this view of the subject, what is very well known, that dissatisfaction still existed in the army after all the resolutions in its behalf, already adverted to, had passed; and the resolution of August, 1780, was followed by another in October, 1780, by which Congress declared "that the officers who should continue in the service to the end of the war should also be entitled to half pay *during life*." This was an effective and generous offer and provision, commuted, however, at the close of the war, for five years' full pay; but yet nothing was said here about any further provision for the representatives even of those officers dying in the service to whom this offer and promise was made, much less about any provision for the representatives of those officers who had already died in the service, from the commencement of the war down to that day.

The committee think, that neither by the fair construction of the language of the resolution of August, 1780, taken in connexion with that of May, 1778, nor by the manifest object and intent of Congress in this measure, can it be admitted that the provisions of that resolution should be deemed to extend to the case of any officer who died in the service previous to the 15th of May, 1778. Such officer, however he may or may not have intended, had he lived, to serve for the war, could not have engaged in that service under the promise and inducement of the resolution of May, 1778; and his case, therefore, was not within the equity of that resolution, as was that of those officers who continued or engaged in the service after that resolution passed, and upon the faith of Congress as pledged by that resolution.

Before concluding this report and opinion, it is due to the subject to state briefly what has heretofore transpired in regard to the construction and application of this resolution of the 24th of August, 1780.

In a report made to Congress by General Knox, Secretary of War, in 1793, (Am. State Papers, Claims, p. 70,) it is said: "Some of the States, in pursuance of the resolve of Congress of the 24th of August, 1780, did make provision for the widows of certain officers who were killed, or who died before the 15th of May, 1778;" and the Secretary adds a list of cases, in proof of this assertion.

The committee believe that a great error was committed in this statement, and that it consisted in supposing that, in the cases furnished by the Secretary, where provision had been made by the States for seven years' half pay to widows or orphans, the States had acted "in pursuance of the resolve of Congress of the 24th of August, 1780," and in such a manner as to construe that act in the way the Secretary had supposed. If *any* case of that sort occurred, it does not appear, while it does distinctly appear that some of the cases named in the Secretary's list were provided for without reference to the resolution of August, 1780. Thus, the case of the widow of General Wooster, of Connecticut, who died in 1777, is named in this list. General Wooster was a major general of militia, and not commissioned by Congress at the time of his death; and the case was in no respect, therefore, within the resolutions of May, 1778, and August, 1780. Congress passed a special resolution on the 4th of May, 1785, recommending to the State of Connecticut to provide for the case, and it was provided for more amply than Congress had recommended.

Other cases named in the Secretary's list were doubtless provided for

under State laws, passed, some of them, before the resolution of August, 1780, and others passed afterwards, but without any special reference to it. Congress, by resolution of the 17th of August, 1779, had recommended the subject generally to the States. New Jersey had already passed an act on the subject; Pennsylvania passed an act on the same subject on the 1st March, 1780; Maryland followed with an act in 1785, reciting the resolution of Congress of August, 1779, but taking no notice of that of August, 1780. The committee do not mean to say that no State at any time ever construed the resolution of August, 1780, as extending to the case of officers dying in service before the 15th of May, 1778; but, if it was so, it does not distinctly appear. Some of the cases cited by General Knox were certainly considered and settled on other grounds, and, for aught that appears, all of them may have been so.

In 1787, as we find by a report made by General Knox in 1790, (American State Papers, Claims, page 22,) the case of Colonel William Douglass, an officer in commission by Congress, from the State of Connecticut, and who had died in service in the year 1777, came before Congress on the petition of his widow. It had already been before the Legislature of Connecticut as a claim, on the basis of the resolution of August, 1780, and had been rejected. It was now reported upon by a committee of Congress, who were of opinion "that the resolve of Congress of August 24, 1780, being founded on the resolve of the 15th of May, 1778, confers no right to the widows or orphans of any officers who were not in service on or after the said 15th day of May, 1778." The committee who made this report consisted of Mr. Wingate, Mr. Morris, and Mr. Paine. (Minute book of Secretary of Congress, in the State Department.)

General Knox, as Secretary of War, made several reports to Congress in favor of claims like that of the widow of Colonel Douglass, from 1790 to 1793; but in no instance, at that period, was any such claim allowed by Congress. Upon a report of the Secretary, made in 1791, the House of Representatives passed a bill allowing several claims under the resolution of August, 1780, and including several in cases where the officers had died before the 15th of May, 1778. Among these was the very case of *Richard Shubrick*, now under consideration. On the 14th of December, 1791, a committee of the Senate reported on this bill; and in reference to the cases, named in the bill, of officers who had died before the 15th of May, 1778, they declared that, "in the opinion of the committee, their widows and orphans are not included in the provision made by the resolution of August 24, 1780." The Senate, on this report, amended the bill by striking out all these cases, including that of *Richard Shubrick*. This was on the 1st of March, 1792; and the next day a motion was made to restore to the bill the words "*Richard Shubrick*," which was rejected. (Senate Journal of 1791-'92.)

No further action appears to have been had by Congress on this description of claims until 1832, when an act was passed allowing one of these claims. This was done on the suggestion of a committee, the petitioner having asked, not for seven years' half pay, but for bounty lands, which could not be granted. The door once opened, petitions have poured in upon Congress ever since, and the number of cases seems to be constantly on the increase. It is believed that, from 1832 down to this time, no sufficient scrutiny or examination has been had of the foundation on which these claims rest. The fact that these claims, or the like claims, were re-

jected by Congress, upon deliberate consideration, in 1787 and in 1792, does not seem to have been adverted to at all in most of the cases where laws allowing the claims have passed; and in no case does it seem to have been sufficiently adverted to and considered. The allowance of 1832, made, it is believed, through inadvertence, and certainly without any proper examination, was a precedent for other allowances in 1833; and these, in their turn, became precedents for a new batch of cases the next year; and so it has gone on, the precedents multiplying, and the new cases multiplying faster than the precedents.

The claims of this description before Congress at the present session are understood to be not less than thirty or forty. If they were a thousand, or if they could not be numbered, they ought to be allowed, if they are just, and if the faith of the Government is pledged to allow them. From 1832 to the present time, this seems to have been taken pretty much for granted: at any rate, no sufficient and thorough examination seems to have been given to the question; and the committee think that these precedents, considered as a legislative construction of the resolution of August, 1780, ought not to be deemed of weight enough to overbalance the legislative construction found in the precedents of 1787 and 1792, where decisions were had upon reports of committees deliberately made, who were abundantly capable of construing correctly the language of the resolution in question, and some of whom must have known personally what was the design and intent of Congress in passing it.

In conclusion, the committee, in answer to the resolution of the House, by which the House has directed them to report their opinion on the legal question in this case, express a decided, unwavering, and clear conviction, on their part, after mature consideration, on the grounds stated in this report, that it was not the intention of Congress, by the resolution of the 24th of August, 1780, to extend the grant of half pay for seven years to the widows or orphan children of officers who had died in the service before the 15th of May, 1778, and that the language of that resolution, when taken in connexion with the resolution of the 15th of May, 1778, does not fairly bear or warrant such a construction.